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Appollo Systems, Inc. and International Brotherhood of Electrical Workers, Local 292. Case 18–UC–000423

April 24, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The issue presented is whether the Board should clarify a bargaining unit created by the parties' agreement under Section 8(f) of the Act, in order to confirm an assertedly purposeful exclusion of certain employees from that unit. Having carefully considered the matter, we find, contrary to the Regional Director, that the resolution of this particular issue is best left to the parties' contractual grievance and arbitration procedure. Accordingly, we reverse the Regional Director's decision clarifying the bargaining unit and dismiss the underlying petition.

I. BACKGROUND

Appollo Systems, Inc., the Employer, is an electrical/energy contractor that has served residential customers in Minnesota for many years. In 2004, the Employer added a commercial division to its business by acquiring, under the name "Focis, Inc. d/b/a Appollo Systems," a commercial electrical operation then known as Connectivity Solutions, Inc. of Minnesota.

¹ Sec. 8(f) permits unions and employers in the building and construction industry to enter into collective-bargaining arrangements without first establishing the Union's majority status, as ordinarily required by Sec. 9(a) of the Act.

Shortly after the acquisition, the Employer agreed to recognize the Union as the representative of the employees in the commercial operation, thereby continuing a voluntary arrangement that had previously existed between Connectivity Solutions and the Union. The Employer and the Union further agreed that their collective-bargaining relationship would not encompass the Employer's residential employees, who had never been represented by any labor organization.

Consistent with those agreements, the Employer signed a letter of assent binding "Focis, Inc. d/b/a Appollo Systems" to the Minnesota Limited Energy Agreement between the Union and area chapters of the National Electrical Contractors Association, a multiemployer association. The letter of assent created an 8(f) agreement between the parties, and the Employer began contributing to the Union's benefit funds for the commercial employees and generally treating the Union as the representative of those employees.

About 3 years later, in late 2007, the Employer ceased using the name "Focis, Inc. d/b/a Appollo Systems" for its commercial operation and began referring to it as "Appollo Systems Commercial Services," while referring to its residential operation as "Appollo Systems Residential Services." In mid-2009, the Union filed a contractual grievance asserting that "the two divisions" had become "one company," and therefore the residential employees should be included in the bargaining unit represented by the Union. In response, the Employer provided the Union with documentation supporting its position that the commercial and residential aspects of its business remained separate, notwithstanding the name change. The Union was not persuaded by this evidence and opted to proceed with its grievance.

The Employer then filed the present petition for unit clarification, seeking a determination from the Board that the residential employees are excluded from the bargaining unit. The Union opposed the petition, contending that (1) the Board's unit clarification procedure is not available where, as here, the collective-bargaining relationship is governed by Section 8(f), and the parties should instead settle the dispute through the contractual grievance and arbitration procedure; and (2) in any event, a clarified unit must *include* the residential employees, because their previous exclusion was predicated on the

² The Regional Director issued a Decision and Order on December 3, 2009, granting the Employer's petition for unit clarification. Thereafter, in response to the Union's request for review, the Board remanded the case to the Regional Director "for a determination of whether the contract between the parties was made pursuant to Section 8(f) or Section 9(a)" of the Act. On remand, the Regional Director issued a Supplemental Decision and Order adopting the parties' stipulation that the contract was an 8(f) agreement. The Regional Director otherwise adhered to the determinations in his earlier Decision and Order, and the Union once again sought Board review of those determinations. On June 30, 2010, the Board granted review. Both parties have filed briefs over the course of the review proceedings.

³ Although the Regional Director issued two decisions in this case, as described above in fn. 2, we refer here only to the initial Decision and Order, in which the Regional Director made findings with regard to the unit clarification petition.

⁴ The Union asserts that it first learned of the alleged change in 2009.

understanding that they would work in an operation entirely separate from the commercial operation, and the Employer breached that understanding by changing its corporate identity in 2007.

II. THE REGIONAL DIRECTOR'S DECISION

The Regional Director rejected the Union's contention that the Board cannot entertain and determine unit clarification issues when they arise in the context of an 8(f) relationship. Noting the Board's broad statutory authority over representation matters, the Regional Director found that this authority may be exercised regardless of the avenue by which a union achieves its representative status—that is, whether the union was selected by a majority of the unit employees pursuant to Section 9(a) of the Act or became their representative pursuant to an 8(f) agreement.

The Regional Director also rejected the Union's concomitant argument that the unit placement of the residential employees was a contractual matter best left for resolution through the parties' contractual grievance and arbitration procedure. The Regional Director relied on Board decisions holding that "questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards and criteria" and that "[t]hese are matters for decision of the Board rather than an arbitrator." *Marion Power Shovel Co.*, 230 NLRB 576, 577–578 (1977) (footnote omitted).

Turning to the merits, the Regional Director found that the Employer's action in 2007 amounted to a name change and did not alter the historical bargaining unit. Because the residential electricians had been historically excluded from that unit, the Regional Director granted the Employer's petition and clarified the unit to exclude the Employer's residential work force.

III. ANALYSIS

We find it unnecessary to pass on the question whether the Board should or should not, as a general matter, entertain a unit clarification petition in the context of an 8(f) relationship, for we see no reason to exercise that authority in the presence of what is, in fact, a contractual dispute. In the particular circumstances of this case, we reject the Regional Director's analysis insofar as he suggested that it would be improper or inconsistent with Board law to defer to the parties' contractual grievance and arbitration procedure.⁵

As the Board has explained in decisions since *Marion Power Shovel*, supra, it is not the case that the Board "never defers to arbitration in cases involving representation issues." *McDonnell Douglas Corp.*, 324 NLRB 1202, 1204 (1997). Rather, the Board has held that "deferral is appropriate 'when resolution of the issue turns solely on the proper interpretation of the parties' contract." Id. at 1205 (citing *St. Mary's Medical Center*, 322 NLRB 954, 954 (1997)). This aptly describes the situation here.

In a typical unit clarification proceeding, we consider the disputed employees' duties in relation to an existing unit of employees. The present dispute, by contrast, turns on whether there was a valid agreement between the Employer and the Union as to their unit status, what the terms of any such agreement were, and whether the Employer subsequently breached that agreement. These are classic questions of contract and are not the unique province of the Board. Instead, they may reasonably be left to the parties' contractual grievance and arbitration procedure. We accordingly defer to that procedure and reverse the Regional Director's findings in regard to the merits of the unit placement question.

In so deferring, we emphasize that we are not abrogating our longstanding general policy against deferral of representation issues that can be resolved only through application of statutory policy—for example, through

⁵ The Union implicitly contends that this dispute is covered by the contractual grievance arbitration procedure, and the Employer does not argue that it is not.

⁶ See, e.g., Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1271 (2005) (examining disputed employees' duties, day-to-day supervision, and relationship to existing unit in order to determine whether they should be accreted to existing unit), enfd. 181 Fed. Appx. 85 (2d Cir. 2006). See also Union Electric Co., 217 NLRB 666, 667 (1975) (explaining that "[u]nit clarification . . . is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past").

examination of the community of interest between disputed employees and those in the existing unit in cases where community of interest is at issue. *See McDonnell Douglas Corp.*, 324 NLRB at 1205. We also emphasize that any arbitral proceedings that do take place as a result of our deferral will remain subject to postarbitral review by the Board upon assertion by either party that the arbitral proceedings or decision fail to satisfy our standards for postarbitral deferral. See *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

ORDER

The Regional Director's Decision and Order clarifying the unit is reversed, and the unit clarification petition is dismissed.

Dated, Washington, D.C. April 24, 2014

Mark	Gaston Pearce,	Chairman
Philip	A. Miscimarra,	Member
Kent '	Y. Hirozawa,	Member
Kent Y. Hirozawa, NATIONAL LABOR F		Men